United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig Contains affd of mailing

75-1345

To be argued by
CHERYL M. SCHWARTZ

13 P75

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1345

UNITED STATES OF AMERICA,
Appellee,

—against—

DOMINICK SEMINARA and STEPHEN LENT,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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UNITED STATES COURT OF APPEALS
FILED
DEC 18 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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Preliminary Statement

Dominick Seminara and Stephen Lent appeal from judgments of conviction of the United States District Court for the Eastern District of New York (Bartels, *J.*), entered on September 19, 1975, which judgments convicted appellants after a jury trial of 50 counts of unlawfully, wilfully and knowingly devising and intending to devise a scheme to defraud 12,000 credit card holders and three banks, of obtaining approximately $120,000 as a result of said scheme, and of causing the United States mails to be used in furtherance of said scheme, in violation of the mail fraud provisions of Sections 1341 and 2 of 18 U.S.C.[1]

[1] The co-defendant Stephen Lent filed a notice of appeal but has not perfected his appeal as of this date. We have been advised by counsel that Mr. Lent intends to withdraw his appeal and will submit an affidavit to that effect. Accordingly, the remainder of this brief will deal with the single appellant, Seminara.

Appellant was sentenced on Counts 1-45 to concurrent split sentences of five months incarceration with two years and seven months probation pursuant to Title 18, United States Code, § 3651 and was fined five hundred dollars ($500.00) on each of counts 46 through 50, for a total of twenty-five hundred dollars ($2500.00). Execution of the sentence has been stayed pending appeal.

Appellant presents these claims on appeal: (1) that the Government failed to charge and prove mail fraud; (2) that a motion for an adjournment that he made on the first day of trial was improperly denied; (3) that principles of "fundamental fairness" require reversal of his conviction because he has been convicted in both state and federal courts for crimes arising from the same series of transactions; (4) that photocopies of the envelopes on which eleven of the mailing counts were based were improperly admitted into evidence, and (5) that the verdicts on thirty-nine of the fifty counts were against the "weight of the evidence."

Statement of Facts[2]

A. The Government's Case

1. The Scheme

Appellant Dominick Seminara and co-defendant Stephen Lent were co-owners with two others of a corporation named Foto Factory, Ltd., ("Foto Factory") located in

[2] Due to the fact that appellant's brief contains no statement of facts adduced at the trial and it consists instead of a statement of "Background and Facts", made up almost entirely of facts not in the record, the Government's statement of the case will be longer than it might have been otherwise. The Government assumes that those statements in appellant's "Background and Facts" which are not in the record, and which are in many instances inaccurate and misleading, will not be considered by the Court.

the latter part of 1973 at 240 Maple Avenue, Rockville Center, New York (T. 564-5, 1208-9).[3] Prior to September 1973, Foto Factory sold camera film and processing of the film (T. 385, 566). The processing was sold by means of a pre-paid film mailer, which was an envelope paid for in advance by the customer (in some instances with credit cards) and used to send exposed film to the company for developing (T. 105-6, 147).

In mid-September 1973, appellant and Lent assumed sole control of the company (T. 1251-2). They instructed certain Foto Factory employees to prepare Master Charge and Bank Americard credit card sales slips for an "Introductory Offer" from Foto Factory (T. 199, 577).[4] These credit card sales slips were to contain the name, address and credit card number of the card holder and were to indicate "Introductory Offer" and "$9.95" as the description and price of the sale (T. 201-6, 342-3, 579). The information pertaining to the card holder's name, address and account number was to be taken from copies of old Foto Factory sales slips, representing prior credit card transactions with the card holders (T. 201, 342-3, 579).

Pursuant to the plan, the bogus "Introductory Offer" sales slips were prepared on Master Charge and Bank Americard forms consisting of three parts—a merchant copy, a customer copy, and a bank or "hard copy" (T. 211, 352). The employees were instructed to separate the forms into three piles, with one pile for each component part (T. 211, 352). The merchant copies were to be retained, the customer copies were sent to the shipping

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[3] Numbers in parentheses preceded by "A" refer to pages in Appellant's Appendix as shown in the bottom right corner. "T" refers to original page numbers of the transcript. Numbers preceded by "GA" refer to pages in the Government's Appendix.

[4] These employees, Toni Variello (T. 197-338), Ellen Kenneally (T. 339-375), Frederick Schroeder (T. 385-512), Theresa Grillo (T. 564-613), and Frances Nieman (T. 1206-1310), testified in the Government's case.

department of Foto Factory, and the bank copies were sent to the bookkeeper in batches of 100 (T. 211, 1217-19). Appellant furnished the old sales slips which were the source documents for the "Introductory Offer" sales slips (T. 214, 354, 584), and he set a goal of preparing 1000 charge slips per day (T. 215).

In the shipping room, Foto Factory employees, pursuant to instructions from appellant (T. 395-6), prepared envelopes, each containing four pre-paid mailers for varying kinds of film and a slip of paper containing the following explanation:

> MONEY BACK GUARANTEE
>
> Enclosed is your assortment of prepaid Foto Factory mailers. One for 12 exposure color film, 2 for 20 exposure color film and one for 20 exposure slide film or Super 8 movie film.
>
> When you are ready to develop your film, simply fill out name and address and enclose film—*SEND NO MONEY*—these are prepaid mailers.
>
> We are certain you will enjoy dealing direct with the Foto Factory. Be sure not to lose or destroy these mailers. They are worth $22.10. (T. 110).

Each of the envelopes contained the return address of Foto Factory or of Foto Max, another trade name of Foto Factory (T. 419, 476). The customer address label was made, pursuant to appellant's instruction (T. 394, 403), by cutting the name and address from the customer copy of the sales slip (T. 388, 403). The remainder of the customer copy, containing the description and price of the "sale", was destroyed (T. 395).

The bookkeeper was instructed by appellant to prepare deposit slips for the sales slips (the hard copies) in

batches of 100 (T. 1216-7). The Master Charge sales slips were to be deposited daily into Foto Factory's merchant account with First National City Bank, and the Bank Americard sales slips were to be deposited daily into Foto Factory's merchant account with Chase Manhattan Bank (T. 1221-2). Pursuant to that plan, these sales slips were deposited in person at the banks by Foto Factory employees (T. 416-17, 1221-2). The amounts deposited were credited by the banks as cash (T. 652, 877), and the employees withdrew daily all but a balance of $100 from each account and deposited these monies into Foto Factory's account at the then Franklin National Bank (T. 1244-5).

This depositing procedure was followed with regard to First National City Bank until October 16, 1973, when First National City Bank refused to accept the deposit (T. 1243). Similarly, the pattern of deposits continued with regard to Chase Manhattan until October 17, 1973, when Foto Factory's account was frozen by Chase Manhattan (T. 1256). On October 18, 1973 a deposit of the "Introductory Offer" $9.95 charges was made at appellant's instructions into Foto Factory's Bank Americard merchant account at the National Bank of North America (T. 1226-7, 1256).

In sum, between September 21, 1973, and October 18, 1973, over 12,000 bank copies representing Master Charge and Bank Americard credit card charges for the "Introductory Offer", each in the amount of $9.95, were deposited in the three banks, and approximately $120,000 was withdrawn from Foto Factory's accounts in these banks (T. 664, 1016, 1098). After the individual sales slips were deposited with the banks, the amount of the "sale" was then entered on the account of the individual credit card holder. A corresponding charge therefor was sent on the customer's billing statement (See T. 115-17, 149, 179, 190, 381, 517, 554, 755, 760, 768, 864-5 for testimony of some of the customers).

2. Proof of the mailings

The envelopes prepared by the shipping department, containing the "Introductory Offer", were run through Foto Factory's Pitney-Bowes postage meter (T. 430-1, 1317). The envelopes were then placed in a tray and were picked up at the Foto Factory premises by U.S. Postal Service employees (T. 437-9).

Fifty of these envelopes, received through the mail by the addresses, formed the bases of the fifty counts of the indictment. At the trial, the Government produced twelve credit card holders, who testified with respect to eleven of the counts (Counts 1, 4, 6, 7, 13, 22, 23, 30, 34, 36, 40). Each of these witnesses testified that he or she had had at least one transaction with Foto Factory before September 1973 in which his or her Master Charge and/or Bank Americard credit card had been used (T. 103-4, 140, 173, 187, 377, 514, 542, 752, 758, 765-6, 858); that in September or October 1973 an envelope containing the aforementioned pre-paid mailers and written enclosure had been received by mail (T. 106, 141, 173, 188, 378, 515, 542, 753, 758, 767, 863); that he or she had not ordered the pre-paid mailers (T. 114, 141, 173, 190, 381, 517, 544, 753, 759, 767, 863); that he or she interpreted the written enclosure to mean that the mailers were free (Tr. 123, 149, 177, 189, 380, 516, 544, 760, 863); that his or her Master Charge or Bank Americard account statement subsequently included a charge in the amount of $9.95 for an "Introductory Offer" from Foto Factory (T. 115-17, 149, 179, 190, 381, 517, 545, 755, 760, 768, 864-5); and that this charge had not been authorized (T. 119, 150, 179, 381, 518, 554, 755, 764, 769). Each card holder but one testified that the account had been credited by his bank after he or she complained about the charge (T. 121, 180, 382, 519, 546, 755, 761, 769, 866). One card holder paid the charge and had not been credited for it despite his complaints (T. 192). None of the witnesses had received a credit from Foto Factory.

The envelopes on which the remaining thirty-nine counts were based consisted of twenty-eight originals (Exhibits 3, 14, 16, 18, 19, 20A, 20B, 21, 24-29, 31, 33-37, 39-41, 45, 47-50) and eleven photostatic copies (Exhibits 15, 17, 22, 23, 30, 32, 38, 42, 43, 44, 46). Each of the fifty envelopes was identified by the shipping room manager as being the kind of envelope prepared and mailed in connection with the $9.95 "Introductory Offer" (T. 426-29, 468-80). In addition, Postal Inspector David Krasula identified the eleven xerox copies of envelopes as the documents he received from the addressees in response to his request for the original envelope or a photostatic copy thereof (T. 1335-37).[5]

3. The scheme's break-up.

Shortly after the mailings were begun in mid-September, Foto Factory employees began to receive complaints from the addressees (T. 219, 404, 588, 1236-7), who stated that they neither had ordered the "Introductory Offer" nor had authorized a charge for such to their credit card accounts (T. 225, 404, 588, 1236-7). The appellant instructed the employees to tell the customers that there had been a computer error and that their accounts would be credited (T. 222-3, 404-5, 588, 1242).* In fact, none of the employees who had prepared the charge slips had used a computer list (T. 217, 357, 407-8, 585-6).

After the complaints started coming into Foto Factory, the mailings and chargings to prior customers continued (T. 225, 366, 406, 1242). Appellant and the co-defendant continued to check on the number of "Introductory Offers" that were being sent out (T. 227, 406-7, 1242).

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[5] The Government will have at oral argument the fifty exhibits consisting of original and copies of envelopes, on which the mailing counts were based.

[6] Only a few credit vouchers were deposited with the banks (T. 1241).

In October and November, pursuant to numerous complaints of their card holders concerning unauthorized $9.95 charges, representatives of First National City Bank Master Charge, Chase Manhattan Bank Americard, and National Bank of North America Bank Americard contacted appellant and the co-defendant (T. 652-3, 1016-19, 1099-1101). Each asked for an explanation of the unauthorized charges, and each was given the computer error explanation by appellant (T. 677-8, 796, 1019, 1101). Appellant and the co-defendant explained that Foto Factory had had a national advertising campaign for the $9.95 "Introductory Offer" and that by mistake the computer list of customers ordering this offer had been combined with a list of all prior customers of Foto Factory and that everyone on the combined list had been billed (T. 679, 1019-24, 1104). Appellants could not show the bank representatives any documentation of the "Introductory Offer" orders and refused to give them the name of the computer company which had made the lists (T. 683, 796, 1025, 1108). Appellant did agree to investigate the mistake that had been made and to provide a list of the computer transactions involved (T. 683).

On October 17, 1973, the day on which appellant promised a First National City Bank official a list of the erroneous computer transactions, appellant contacted Clayton London, a computer services owner (T. 683, 929). He asked Mr. London to prepare a list of approximately 27,000 names of prior Foto Factory customers (T. 929-33). A few days later, appellant told Mr. London that the list had been incorrectly prepared and asked him to break it into two separate lists, one containing only Master Charge customers and one containing only Bank Americard customers (T. 942-43). The latter two lists were delivered to appellant on November 5, 1973 (T. 951), and appellant delivered them to First National City Bank on November 11 (T. 692, 801).

B. The Defense Case

Appellant called on his behalf a certified public accountant who testified that he had done a limited study of deposits and disbursements between September 15 and October 31, 1973, for Foto Factory's merchant accounts at First National City Bank, Chase Manhattan Bank and National Bank of North America, and Foto Factory's regular checking account at Franklin National Bank (T. 1360-61). His study showed that approximately $70,000 from the Chase account, $55,000 from the First National City Bank account and $12,500 from the National Bank of North America account had been deposited into the Franklin National Bank account during this time period (T. 1380). He concluded that the funds deposited into the Franklin National Bank had been used to meet operating expenses of the business (T. 1387-89).

Appellant also called three former employees of Foto Factory who testified that a flyer-advertisement for the $9.95 "Introductory Offer" had been mailed to Foto Factory customers in September and October, 1973 (T. 1444, 1489, 1665-6, 1706-7). Only one of these employees, Donna Scuoteguazza, had actually prepared the mailing of this advertisement (T. 1464, 1473), and she testified that she had not begun such mailings until after Foto Factory had received at least one complaint from a customer concerning an unauthorized credit card charge of $9.95 for the "Introductory Offer" (T. 1463).

Appellants also produced four newspaper advertisements for the $9.95 "Introductory Offer". These advertisements were dated October 28, 1973, and October 30, 1973 (T. 310), more than a week after the banks had begun to freeze Foto Factory's merchant accounts (T. 666).

C. Rebuttal.

In rebuttal, Edith McKillop, the secretary to the owner of an advertising agency named John-John's Group, Inc., testified that the owner of the company, John Amato, had placed those four advertisements pursuant to a request from Foto Factory on approximately October 21, 1973 (T. 1743, 1750-60). She further testified that the flyer-advertisements which Miss Scuoteguazza had mailed to Foto Factory customers was produced after October 21, 1973 (T. 1792-93). This flyer-advertisement, therefore, was produced after the banks had refused to accept any further deposits of the $9.95 charge slips, and after appellant had told bank representatives of a "national advertising campaign."

D. Defense summation.

In his summation, appellant argued to the jury that he had not created any scheme to defraud and had no intent to deceive the former customers of Foto Factory. Appellant argued that the mailers had some value, that they were worth approximately $22.10 (T. 1890, 1898). He reasoned that there would be fraud only if Foto Factory attempted to charge the customers for something of no value (T. 1891-2). He further argued that Foto Factory merely had been involved in an ordinary business promotion (T. 1892). Business promotions are "in the American Tradition" and should not be considered criminal in nature (T. 1892). Appellant implied that no harm to the customers was intended. The customer could complain and receive a credit if he did not want the merchandise (T. 1891). Thus, he argued that Foto Factory had sent a letter to the customers which offered either to process their film if they used the prepaid mailers or to credit the customer's account (T. 1901-2).

Finally, appellant urged the jury to consider whether there had been proof beyond a reasonable doubt as to

each and every element and as to each and every count (T. 1903-4). In sum, appellant argued to the jury, much as he does here, that there was no scheme to defraud, no intent to defraud and no harm to the customers, and that there was insufficient proof as to each and every count of the indictment.

ARGUMENT

POINT I

Appellant was properly charged and convicted of mail fraud.

Appellant attacks his conviction on the grounds that (1) the indictment and proof at trial failed to show a scheme or artifice to defraud; (2) the Government failed to prove intent to defraud; and (3) the mailings alleged in the indictment were not made for the purpose of executing the scheme to defraud. That is to say, the appellant contends that the Government failed to prove any of the essential elements of the crime.

The Government contends, as it has each time appellant has raised these issues, that the indictment is sufficient on its face, that the proof adduced by the Government overwhelmingly shows a scheme and intent to defraud, and that the mailings played an important part in executing the scheme. The record amply supports the Government's position.

In September 1973 Foto Factory was in financial difficulties and needed to raise money. The officers of Foto Factory had attempted unsuccessfully to obtain a loan from Franklin National Bank. Appellant and defendant Lent seized upon what were Foto Factory's only assets at that time—so-called prepaid mailers and the credit card numbers of former customers, and they devised a plan to use these assets to obtain cash.

As a first step, they drafted a purposely ambiguous statement, which was to be included in a package of assorted prepaid mailers. This statement and the prepaid mailers were then mailed to former customers, and at the same time credit card sales slips each in the amount of $9.95 were deposited into three banks. These charge slips, which in fact had been created without the knowledge or consent of the card holders, impliedly represented to the banks bona fide sales by Foto Factory to the card holders. The money credited to Foto Factory for these charge slips was withdrawn and deposited into Foto Factory's working checking account. All of this was done at the direction of appellant and Lent.

The mailings were designed to mislead, confuse and lull the former customers. When the customers first received the mailers, they were misled to believe that the mailers were free, by the written enclosure, which read in part "send no money", together with the fact that they had not ordered the mailers.

Later, when the customers received charges for the "Introductory Offer", appellant very likely hoped that the customers would be assuaged by the "bargain" they were receiving (supposedly $22.10 worth of film developing for $9.95) and would refrain from demanding a credit or refund from Foto Factory. The mailing would have had the effect of softening up the customers to pay for something they had never requested.

In addition, in the interim between receiving the mailers and the credit card charge, some customers may have used the mailers. Upon receiving the charge, the customers may have believed they were obligated then to pay for the mailers.

Finally, the mailings were the basis of the "computer error" and "honest business mistake" defenses. Once

complaints were received, defendants had planned to explain that the mailings and billings had been done in error. They would promise to track down the reason for the error and would promise refunds to those who complained. This explanation was designed to forestall both complaints to authorities and detection of the scheme to defraud and to lend credibility to the false explanations. The "computer error" explanation would not have been at all plausible unless the mailings had, in fact, been made.

The mailings, then, had three purposes. First, they facilitated appellant's efforts to obtain money. Second, they delayed complaints and allowed appellant the use of the money for a period of time. Third, they played a role in avoiding discovery of the true nature of the scheme.

1. The sufficiency of the indictment.

The indictment sufficiently states a scheme to defraud. A "scheme" within the meaning of § 1341 involves some connotation of planning and pattern. *Fabian* v. *United States*, 358 F.2d 187 (8th Cir.), *cert. denied*, 385 U.S. 821 (1966); *United States* v. *Ross*, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963). It is obvious that the indictment, which speaks for itself, sets out both a plan and pattern by appellant to obtain money by misrepresenting to credit card holders that they were getting free services and by misrepresenting to banks that the deposited charge slips represented bona fide sales. The indictment meets the requirements of Rule 7(c), F.R.Cr.P., in that it sets forth the essential elements of the offense, it fairly informed the defendant of the charge against him, it enabled him to prepare for trial, and it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *United States* v. *Trotta*, — F.2d — (2d Cir. slip op. 473, 477; decided November 10, 1975), citing *Hamling* v. *United States*, 418 U.S. 87, 117 (1974).

2. Sufficiency of the evidence.

A review of the trial record amply reveals both a plan and pattern by appellant, as demonstrated by his instructions to employees, his continued supervision of their activities to insure the continuation of the plan, the considerable length of time the mailings were continued, and appellant's formulation of a defense in advance of receiving complaints as a result of the plan or scheme.[7]

Appellant's contention that the government failed to prove intent to defraud is based on his claims that (1) the written enclosure sent to the addressee failed only to disclose how the addressees would pay for the prepaid film mailers; and (2) the appellant was at all times ready, willing and able to provide a service of equal value to the charge or bill submitted against the addressees' accounts. However, these arguments ignore the fact that the written enclosure failed to disclose what appellant knew all along, that the addressee would be charged at all. The appellant passes over the central part of the scheme, the addressees were charged without their knowledge or consent. The addressees were being forced to buy something which they had not requested, and the appellant and Lent knew that at the time the mailings were made.

Furthermore, appellant's alleged willingness to provide the services charged for or in the alternative to give a refund is no defense to the charge of intent to defraud. This contention amounts to little more than a half-hearted offer of restitution. That is, if the appellant were caught

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[7] The evidence presented at trial must be viewed upon appeal in the light most favorable to the government. *United States* v. *Castellana*, 349 F.2d 264, 267 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966). All permissible inferences are to be construed in the government's favor. *United States* v. *Marchisio*, 344 F.2d 653, 662 (2d Cir. 1965); *United States* v. *Dardi*, 330 F.2d 316, 325 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964).

at his scheme, he would try to rectify the damage done. Many bank robbers, embezzlers and tax evaders would leap at such a chance to escape criminal liability, if such a door were open.

Appellant also argues that he had no intent to defraud the addressees because all the customers who did not want the merchandise obtained refunds from the company. This is an almost scurrilous misstatement of the evidence. Not one of those addressees who testified had received a refund from Foto Factory. Each had received a refund from a bank. Indeed, one addressee, Charles Sheehan, testified that he never had received a refund from any source (T. 192). Furthermore, several addressees testified that they could not reach Foto Factory or that Foto Factory never responded to their complaints (See, e.g., T. 529-30, 760, 769). Former employees testified that only irate in-person complaints received cash refunds, and few credit vouchers were deposited with the credit card companies. The bank officials testified that thousands of dollars of refunds were given to card holders, but Foto Factory never reimbursed the banks for the refunds (T. 669-72, 1038).

Appellant argues that the absence of a false statement in the "Introductory Offer" negates any charge of fraud. Appellant places too great an emphasis on the need of a false statement. Misrepresentations can be made by concealment of a material fact or by the mere arrangement of words, and such misrepresentations are included within the meaning of the "false or fraudulent pretenses, representations, or promises" language of § 1341. *Williams* v. *United States*, 368 F.2d 972, 975, (10th Cir.), *cert. denied*, 386 U.S. 997 (1967).

Appellant argues that the government failed to demonstrate any intent to harm the addressees because the value of the mailers was substantially more than the $9.95

charged for it. Appellant cites, *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), in support of this proposition. In *Regent*, the corporate defendant was engaged in the business of selling stationery supplies through telephone salesmen. The Government and the defendant stipulated that the salesmen secured sales by means of false pretenses which consisted of misrepresenting the relationship of the salesmen to someone known to the customer or of concealing the fact that the caller was a salesman rather than a professional or good samaritan seeking to dispose of unneeded stationery. The Government's case consisted solely of the stipulation. The defense showed that the misrepresentations were only preliminary and did not concern the stationery itself, that the price and quality were discussed honestly, that the goods could be returned if unsatisfactory and that price offered was fair.

This Court, while expressing reluctance to make a decision on such minimal and speculative evidence, held that "solicitations of a purchase by means of false representations not directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain" do not constitute a scheme to defraud. *United States* v. *Regent, supra*, 421 F.2d at 1179. The Court left open the question of how it would have ruled on a different set of facts. The attitude of the Court is perhaps best revealed by its admonition to the defendant:

> We do not, however, condone the deceitfulness such business practices represents. . . . On the contrary, we find these 'white lies' repugnant to 'standards of business morality'. *United States* v. *Regent, supra* at 1179.

Regent can be distinguished from the instant case in that the false representations in *Regent* did not pertain to the actual product being sold. In the instant case, the

misrepresentations go to the very nature of the transaction involved, that is, whether the addressees were receiving a gift or were involved in a sale of goods and services. Thus, the Court in *Regent* examined

> . . . the government's theory that fraud may exist in a commercial transaction even when the customer gets exactly what he expected and at the price he expected to pay. *United States* v. *Regent*, *supra* at 1180.

It can hardly be said that the Foto Factory customers got what they expected (a gift) at the price expected to be paid (nothing). Further, the Court held that there was no intent to defraud

> . . . because the falsity of their representations was not shown to be capable of affecting the customer's understanding of the bargain nor of influencing his assessment of the value of the bargain to him, and thus no injury was shown to flow from the deception. *United States* v. *Regent*, *supra* at 1182.

In the instant case the misrepresentations concealed the true nature of the transaction; the addressee could not understand the bargain, nor assess its value to him. The evidence unequivocably demonstrates that the appellant intended to conceal the nature of the transaction and to benefit by obtaining addressees' money or the use of addressees' money for a period of time.

3. The Use Of The Mails

Finally, appellant contends that the mailings which he caused to be made were not sufficiently related to the scheme to bring his conduct within the mail fraud statute. The appellant cites *Kann* v. *United States*, 323 U.S. 88 (1944) in support of his position. Appellant argues that

the fraud could have been completed without mailing the "Introductory Offer" to the customers and, therefore, the mailing did not add a new element to the scheme.

The holding of the *Kann* case was followed in *United States* v. *Maze*, 414 U.S. 395 (1974). Significantly, the Supreme Court distinguished the facts in *Maze* from those in *United States* v. *Sampson*, 371 U.S. 725 (1962) and *Pereira* v. *United States*, 347 U.S. 1 (1954). We believe that the facts of the instant case are more closely related to those in *Sampson* and *Pereira* in that they show the mailings not only were in furtherance of the scheme but were an integral part of the fraud itself, and thus meet the requirements of *Maze*. The significance of a fact-oriented analysis has been made clear by this Circuit:

> *Maze* blazed no new trials, it simply decided which of two lines of Supreme Court decisions attracted cases where the fraud was perpetrated by use of a stolen or counterfeit credit card, with the mails involved only by the foreseeable efforts of the victim and his bank to effect collection. *United States* v. *Travers*, 514 F.2d 1171, 1174 (2d Cir. 1974).[8]

In the instant case, from the inception of the scheme until its discovery, the mailings were an integral part of the defendants' plan. The appellant and his co-defendant themselves chose to use the mails; the mails were not used, as in *Kann*, only because the victims or some third party chose to utilize the mails. Appellant's argument that the scheme could have been completed without the use of the mails is irrelevant because the issue is not

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[8] Circuit Court cases decided after *Maze* have dealt primarily with distinguishing or comparing the facts of the case *sub judice* with the facts in *Maze*. See, e.g. *United States* v. *Marando*, 504 F.2d 126 (2d Cir. 1974), *cert. denied*, 419 U.S. 1000 (1974) and *United States* v. *Shepherd*, 511 F.2d 119 (5th Cir. 1975).

whether there was an alternate method of completing the scheme, but whether the mailings were incident to an essential part of the scheme. *United States* v. *Shepherd*, 511 F.2d 119 (5th Cir. 1975), citing *Pereira* v. *United States, supra.*

As stated above, the mailings played a multiple role in appellant's scheme. They were used first to conceal the fact that the card holders had been charged for the "Introductory Offer". As in *Sampson*, they had the additional effect of preventing or delaying complaints from the addressees. They were also used to facilitate and strengthen the cover-up defenses of "computer error" and "honest business mistake", making apprehension less likely. As in *Shepherd* and *Marando* the mailings were part of an ongoing scheme whereby appellant could continue to obtain money and to enjoy the use of money already obtained. The mailings helped appellant to acquire the fruits of scheme, as in *Pereira*. Appellant reaped benefits less likely to have been received than if no mailings had taken place. *United States* v. *Maze, supra*, at 402.

The facts of the instant case are far closer to those developed in *Sampson*, *Pereira*, *Marando* and *Shepherd* than in *Maze* and *Kann*. In the instant case, the mailings were sufficiently related to the fraud to be for the purpose of executing the scheme, and as such, bring the instant case clearly within the ambit of the mail fraud statute.

POINT II

Appellant was not denied his right for pre-trial discovery when the District Court denied his eleventh hour request for an adjournment of the trial.

Appellant has conjured from the record the claim that he was in some way deprived of his right to seek discovery in this case. This "claim" arises out of the circumstance that on the first day of trial, which itself was the result of a two month adjournment requested by appellant's counsel, a further adjournment was requested by appellant in order to "formulate a defense" (A. 66), in the face of several false exculpatory statements that he had made in late 1973 to various federal and local consumer agencies to ward off discovery of his fraudulent scheme.[9]

We are frankly at a loss to understand that there is any basis for appellant's claim. Certainly, no additional "discovery" was requested by appellant that was ever denied by Judge Bartels. Quite simply, appellant's counsel was making every effort to further delay this trial. Thus, counsel's efforts to tie the requested adjournment into the surfacing of his 1973 statements was unaccompanied by any reasoned statement that appellant would be prejudiced by the failure to accord him yet another adjournment of the trial. Indeed, even on appeal, appel-

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[9] Appellant never made a motion for discovery. Nevertheless, prior to trial, Government counsel made available copies of (1) a letter appellant had written to the Federal Trade Commission on November 15, 1973 (A. 70); (2) a transcript of his testimony before the New York State Attorney General, Bureau of Consumer Fraud (G.A. 11); and (3) his testimony before the New York City Department of Consumer Affairs (G.A. 61). Appellant, of course, was at all times aware of the existence of these matters. At no time, however, did he request the assistance of the United States Attorney to procure copies of these materials.

lant can claim no prejudice. Finally, the statements that were disclosed to counsel were never used at the trial because there already was ample evidence in the case of appellant's attempts to fabricate a cover-up for the scheme.

POINT III

The double jeopardy clause did not prohibit the continued federal prosecution of appellant Seminara following his plea to the state court indictment.

In Point Three of appellant's brief it is urged, in the course of five and a half pages, that "Our system of justice dictates that no person shall be placed in jeopardy more than once for the same offense." For the most part we agree with the abstract statements made by the appellant in his ensuing discussion of the policies behind the double jeopardy clause. Appellant, however, is forced to concede in the last paragraph of the point that there is no basis to claim that the double jeopardy clause was violated in this case when the United States asserted its interest in prosecuting appellant and his co-defendant for the serious crimes they had committed.[10] Of course, *Abbate* v. *United States*, 359 U.S. 187, 195 (1959), expressly rejects appellant's argument that his conviction in the state court for the state crimes related to this scheme bars this federal prosecution. See also, *United States* v. *Wapnick*, 198 F. Supp. 359 (E.D.N.Y. 1961), *aff'd*, 315 F.2d 96 (2d Cir. 1963), *cert. denied*, 374 U.S. 829 (1963).

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[10] From simply a "fairness" point of view, forgetting for the moment that the appellant's contention has no basis in law, it is significant that appellant's "claim" of double jeopardy was first triggered when he decided to plead guilty in January 1975, to the state court indictment just one month after the federal indictment was returned but a year and one month after the state court indictment was returned.

POINT IV

The admission in evidence of the envelopes of which the counts of the indictment were based was proper.

In Point Four of his brief, appellant makes two claims with respect to the admission in evidence of the envelopes which had been mailed to the customers of Foto Factory. With respect to the bulk of the envelopes, which were originals, we cannot understand appellant's contention that their admission into evidence violated the best evidence rule.[11] (It appears that counsel has misapprehended the nature of these exhibits). The remaining envelopes, eleven in number,[12] concededly were xeroxed copies so we assume that appellant's contentions with respect to the best evidence rule was intended for those exhibits. For the following reasons we believe that the admission in evidence of the xeroxed envelopes was entirely appropriate.

The eleven photocopies in question were admitted into evidence on July 7, 1975, pursuant to the Federal Rules of Evidence, Rule 1003, which Section 1003 provides as follows:

> A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances, it would be unfair to admit the duplicate in lieu of the original.[13]

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[11] There were 39 original envelopes which had contained the "Introductory Offer": Government Exhibits 1A, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 16, 18, 19, 20-A, 20-B, 21, 24, 25, 26, 27, 28, 29, 31, 33, 34, 55, 36, 37, 38, 39, 40, 41, 43, 45, 46, 47, 48, 49, 50 and 71.

[12] Government Exhibits 15, 17, 22, 23, 30, 32, 38, 42, 43, 44 and 46, were received by the Postal Inspection authorities from the recipients in response to a request for the "original or a photostatic copy" (T. 1335-37).

[13] Under Rule 1001(4) of the Federal Rules of Evidence, a xerox copy is defined as a "duplicate."

In the instant case, there were thirty-nine original envelopes in evidence with which to compare the photostatic copies. (The authenticity of the originals is unquestioned. See Rule 901(b)(3), Federal Rules of Evidence.) Each copy resembled the originals in that the return address and the form of the address on the copies were like those on the originals (T. 423). In addition, the shipping room manager testified that during the period of time alleged in the indictment, the only envelopes shipped out were "Introductory Offer" envelopes (T. 481). In short, there were substantial guarantees of the authenticity of the xerox copies, and their connection with appellant. See *United States* v. *Natale*, — F.2d — (2d Cir. slip op. 793, 811; decided November 28, 1975).

As to illegibility, the district court examined the exhibits and found them acceptable:

> The Court: This [copy] is the worst of all. I think obviously there is a meter number on this of some kind. We have had Foto Max which was testified to the jury, and they can make such inferences as they wish. The fact that it has little weight does not mean it is not admissible. (T. 1331-2).

POINT V

The Government established sufficient evidence of appellant's guilt on each of the fifty counts of the indictment.

Appellant contends that the only way the Government could prove each of the fifty mail counts was by calling the addressee of each letter which formed the basis of the particular count. He argues that since the Government called only eight addressees,[14] the Government could not show that the other addressees were defrauded, and the conviction of appellant on the other forty-two counts must be reversed because of insufficient evidence as to those counts (Appellant's brief, pp. 46-47).

Appellant's contention is grounded on the erroneous presupposition that an essential element of mail fraud is actual defrauding of the target of the scheme. The essential elements of mail fraud are (1) a scheme to defraud by means of false representations and (2) use of the mails in furtherance of the scheme. *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970). Proof of actual defrauding is not a necessary element of the crime. *New England Enterprises, Inc.* v. *United States*, 400 F.2d 58, 72 (1st Cir. 1968), *cert. denied*, 393 U.S. 1036 (1969); *United States* v. *Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

The Government established both a scheme to defraud and the use of the mails to execute the fraud by means of the testimony of the former employees. More specifi-

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[14] In fact, the Government produced eleven addressees, not eight as appellant states. These addressees were those named in Counts 1, 4, 6, 7, 13, 22, 23, 30, 34, 36, and 40.

cally, Tony Variello, Ellen Kenneally and Theresa Grillo testified that credit card sales slips for the $9.95 "Introductory Offer" were prepared by using only old charge slips to write the orders (T. 201, 342-3, 579). No orders from customers for the "Offer" were used to prepare these documents. Frederick Schroeder testified that he prepared envelopes for each charge slip, that he sent out an envelope for each charge slip received, and that he included in each envelope the explanatory slip of paper, alleged in the indictment to omit the material fact that the addressee already had been charged $9.95 for the contents. (T. 439). Frances Nieman, the bookkeeper, testified that the charge slips for the $9.95 "Offer" were routinely deposited into banks and the proceeds therefrom were routinely withdrawn (T. 1221-22, 1244-5). Finally, Frederick Schroeder testified that in the regular course of business the "Introductory Offer" envelopes that were prepared were put through a postage meter and were then picked up by a Postal Service carrier for mailing (T. 436-439). Mr. Schroeder also testified that each of the envelopes on which the fifty counts were based were similar to those he prepared for the "Introductory Offer" (T. 435), and Francis Libasci, a Postal Service employee, identified Foto Factory's postage meter number (T. 1317), which was present on each envelope.

The testimony of the above-mentioned witnesses, coupled with the introduction of the envelopes representing each count was sufficient to establish that those letters had been mailed and, as discussed in Point I, *supra*, mailed in furtherance of the scheme to defraud. Testimony of those addressees called as witnesses merely corroborated the testimony of the employee witnesses in establishing the mailings. Clearly, the direct testimony of each and every addressee that he or she received the letters was not needed to establish the Government's cases as to each count. See *United States* v. *Flaxman*, 495 F.2d 344, 348

(7th Cir), *cert. denied*, 419 U.S. 1031 (1974); *United States* v. *Fassoulis*, 445 F.2d 13, 17 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971); *Stevens* v. *United States*, 306 F.2d 834, 835 (5th Cir. 1962).

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
December 15, 1975

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON, being duly sworn, says that on the 18th day of December, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~x~~ two copies of the Brief for the Appellee ~~----~~ of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Albert R. Pincus, Esq.
2950 Hempstead Turnpike
Levittown, New York 11756

~~Robert Rivers~~, Esq.
287 Post Avenue
~~Westbury, New~~ York 11590

Sworn to before me this
18th day of December, 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

Carolyn N. Johnson

CAROLYN N. JOHNSON